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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 970

RICHTER'S BAKERY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 223–229)[1] is reported in 140 F. (2d) 870. The findings of fact, conclusions of law, and order of the Na-

[1] For the convenience of the Court, the method of referring to the record adopted by petitioner is used throughout this brief. Thus, the record certified by the Circuit Court of Appeals entitled "Volume I, Transcript of Record" and containing the complaint, Trial Examiner's Intermediate Report, the Board's Decision and Order, the opinion and decree of the court below, and other papers will be referred to as "R"; and the volumes entitled "Appendix to Petitioner's Brief" and "Appendix to Respondent's Brief" filed in the court below will be referred to as "B. A." and "R. A.," respectively.

tional Labor Relations Board (R. 65–112, 161–169) are reported in 46 N. L. R. B. 447.

JURISDICTION

The decree of the court below (R. 235–238) was entered on March 14, 1944. A petition for rehearing, filed by petitioner on February 28, 1944 (R. 230–234), was denied on March 1, 1944 (R. 235). The petition for a writ of certiorari was filed on May 6, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

Whether the unfair labor practices of a bakery selling all of its products within a State but obtaining raw materials valued at more than $60,000 annually from sources outside the State and closely associated, through its ownership and management, with other bakeries which purchase raw materials valued at more than $220,000 annually from sources outside the State, affect commerce within the meaning of Section 2 (6) and (7) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, p. 11.

STATEMENT

Upon the usual proceedings, the Board, on December 20, 1942, found that petitioner had engaged in certain unfair labor practices affecting commerce and entered the order whose enforcement was decreed by the court below (R. 161–169). The Board's findings concerning the applicability of the Act to petitioner may be summarized as follows:

Petitioner is a Texas corporation engaged at San Antonio, Texas, in the production, sale, and distribution of bread, rolls, and buns (R. 65; B. A. 21, 38). Its corporate stock is equally divided between four Richter brothers and their mother (R. 65–66; B. A. 8). The four brothers are also equal owners of the stock of two other bakery corporations in Texas located at Corpus Christi and Austin, respectively (R. 66; B. A. 8–9, 38, 141). In addition, the brothers and their mother own 80 percent of the stock in a fourth corporation, The Colonial Cake Company (herein called Colonial), which makes cakes and sweet goods and which is located in San Antonio, Texas (R. 66; B. A. 9–10, 38–39, 141). The brothers hold all the offices in each corporation except the office of vice president of Colonial, and each brother maintains his headquarters at petitioner's plant (R. 66; B. A. 7–10, 14–15, 131, 160).

Not infrequently, personnel is shifted from plant to plant, and when a strike was called at petitioner's plant in August 1941, a number of employees from the Corpus Christi bakery and one from the Austin bakery replaced strikers (R. 67; B. A. 27, 28, 31, 36, 139, 169, 170, 191, 253–254). One auditor with an office at petitioner's plant has general supervision over the books of each corporation (R. 67; B. A. 2, 6–7, 29–30, 132–134). He or petitioner's president purchases substantially all raw materials used by petitioner and the Corpus Christi and Austin bakeries (R. 67; B. A. 4–5, 22). Often these materials are purchased by carload lots and delivery is effected by having the freight car make three stops—at Austin, San Antonio, and Corpus Christi—to deliver consignments to each plant (R. 67; B. A. 22–23). Petitioner sells annually to Colonial, the Austin bakery, and the Corpus Christi bakery raw materials valued at about $4,700 (R. 67; B. A. 23–24). Within their respective territories, the other three Richter concerns are the distributors of all of Colonial's products not sold directly by Colonial to retail vendors (B. A. 18–19, 137–138). Petitioner alone distributes about $50,000 worth of Colonial's products annually (B. A. 32).

Together, the Richter concerns constitute one of the largest baking enterprises in Texas (R. 68;

B. A. 36). Their purchases of raw materials for the year ending February 28, 1942, exceeded $719,000 in value, and more than 30 percent of this amount, over $220,000 worth, was shipped to them from points outside the State of Texas (R. 68; B. A. 19–21, 303).

Petitioner alone, during the year ending February 28, 1942 (the period during which most of the unfair labor practices occurred), purchased raw materials valued at $238,968.18, of which more than 25 percent, valued at $60,150.13, came from points outside the State (R. 68; B. A. 19–20, 304–307).[2] These out-of-State purchases consisted of 103 separate transactions with vendors in 11 different States from New York to California (R. 68; B. A. 304–307).

Upon the basis of the above facts, the Board concluded that petitioner's unfair labor practices affected commerce within the meaning of Section 2 (6) and (7) of the Act (R. 112).

On January 9, 1943, the Board filed in the court below a petition for enforcement of its order

[2] Petitioner, in an apparent attempt to avoid the Board's jurisdiction, had reduced its out-of-State purchases to 11 or 12 percent of its total purchases by the date of the hearing before the Board (R. 68; R. A. 37–38, B. A. 230, 235). It had also conditioned its sale of bread to a company transporting laborers out of the State on an agreement by that company that all bread purchased by it would be consumed before the train on which the laborers were riding left the State of Texas (R. 68–69; B. A. 229–230, 318).

(R. 2–7). Thereafter, on February 8, 1944, the court handed down its decision (R. 223–229) and entered its decree (R. 235–238) enforcing the Board's order.

ARGUMENT

Petitioner's contention that it is not subject to the Act is without merit. The court below, upon a careful consideration of the facts, concurred in the Board's ruling maintaining its jurisdiction (R. 224–226). That decision is not, as petitioner contends, "probably in conflict with applicable decisions of this court" (Pet. 3), nor is it in conflict with any decisions of the circuit courts of appeals.

The test of the Act's application, as announced by this Court in *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation,* 301 U. S. 1, 41–42, is whether petitioner's business has "such a close and intimate relation to interstate commerce" that a "stoppage of * * * operations by industrial strife" would interfere with the free flow of goods in their normal channels in interstate commerce. This test is fully met in the instant case whether petitioner's operations be considered alone or in conjunction with the other three Richter bakeries.

Considering petitioner's business alone, as the court below seems to have done (R. 225), it is plain that a stoppage of petitioner's operations by

industrial strife would directly and immediately remove from the flow of interstate commerce a substantial volume of goods valued at more than $60,000 annually (*supra*, p. 5). This volume plainly exceeds "that to which the courts would apply the maxim *de minimis.*" *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 607. The courts have uniformly sustained the jurisdiction of the Board in cases involving the flow of even less goods in commerce. *National Labor Relations Board* v. *White Swan Co.*, 118 F. (2d) 1002 (C. C. A. 4), certiorari denied, 314 U. S. 648; *National Labor Relations Board* v. *Central Missouri Telephone Co.*, 115 F. (2d) 563 (C. C. A. 8); *National Labor Relations Board* v. *Pearlstone Co.*, 115 F. (2d) 132 (C. C. A. 8); cf. *Muldowney* v. *Seaberg Elevator Co.*, 39 F. Supp. 275, 280–281 (E. D. N. Y.); *Lewis* v. *Nailling*, 36 F. Supp. 187 (W. D. Tenn.). It is not material that only 25 percent of petitioner's total purchases moved in interstate commerce, for the provisions of the Act "cannot be applied by a mere reference to percentages." *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453, 467; see also *National Labor Relations Board* v. *J. G. Boswell Co.*, 136 F. (2d) 585, 589 (C. C. A. 9); *Southern Colorado Power Co.* v. *National Labor Relations Board*, 111 F. (2d) 539, 543–544 (C. C. A. 10); *National Labor Relations Board* v.

Cowell Portland Cement Co., 108 F. (2d) 198, 201 (C. C. A. 9).[3]

The amenability of petitioner to the jurisdiction of the Board, however, is not dependent upon the amount of interstate business done by petitioner alone. In view of the substantial identity of ownership and control of the other three Richter concerns and petitioner, the close connection between the operations of each, and the not infrequent interchange of personnel among them (*supra*, pp. 3–4), a labor dispute at petitioner's plant would have repercussions in the other plants. Petitioner's interference with or denial of the rights of its employees to self-organization and collective bargaining would necessarily bring home to the employees of the other Richter concerns the realization that their own attempts to organize and bargain collectively might likewise be resisted and would immediately threaten the interstate movement of large quantities of goods (about $160,000 worth annually; see *supra*, pp. 4–5), for which these related concerns are also responsible.

[3] Nor is it relevant, as petitioner seemingly contends (Pet. 6), that none of the products sold by it moved in interstate commerce or that its purchases from out-of-State sources were made through local salesmen or brokers for the seller. It is pertinent only that a substantial amount of goods move in interstate commerce and that a cessation or interruption of their movement by industrial strife would affect the steady flow of that commerce. *Santa Cruz Fruit Packing Co.*

The Board was not deprived of jurisdiction in this case, as petitioner apparently contends (Pet. 6), because the volume of petitioner's interstate purchases had been reduced to 11 or 12 percent of its total purchases by April 27, 1942, the date of the hearing before the Board. The fact that petitioner may have reduced its interstate business or even ceased to operate altogether cannot affect the Board's jurisdiction to remedy unfair labor practices which, when committed, affected interstate commerce within the meaning of the Act. Petitioner is still a going concern and it may resume the scope of its former interstate operations at any time. *Southport Petroleum Co.* v. *National Labor Relations Board,* 315 U. S. 100; *National Labor Relations Board* v. *Cleveland-Cliffs Iron Co.,* 133 F. (2d) 295, 300 (C. C. A. 6). Moreover, despite the curtailment, a cessation of petitioner's operations would still affect a substantial volume of interstate commerce larger than that to which the term "*de minimis*" may be applied. Goods valued at approximately $27,000 annually flowing from without the State directly to petitioner's plant and the substantial interstate purchases of the affiliated companies would still be threatened with interruption or curtailment by industrial strife at petitioner's plant.

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v. *National Labor Relations Board*, 303 U. S. 453, 463; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 605; cf. *Wickard* v. *Filburn*, 317 U. S. 111, 125.

CONCLUSION

The decision of the court below is correct and presents no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.

WALTER J. CUMMINGS, JR.,
Attorney.

ALVIN J. ROCKWELL,
General Counsel,

RUTH WEYAND,
FANNIE M. BOYLS,
Attorneys,
National Labor Relations Board.

MAY 1944.